

EXPLANATORY STATEMENT

Select Legislative Instrument 2007 No. 276

Issued by the Authority of the Minister for Transport and Regional Services

Aviation Transport Security Act 2004

Aviation Transport Security Amendment Regulations 2007 (No. 3)

The *Aviation Transport Security Act 2004* (the Act) and the *Aviation Transport Security Regulations 2005* (the Principal Regulations) establish a regulatory framework to protect the security of civil aviation in Australia.

Section 133 of the Act provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Items 1 to 33 of Schedule 2 to the *Aviation Transport Security Amendment Act 2006* (the Amendment Act) amend provisions of the Act relating to cargo. The commencement provisions of the Amendment Act provide that items 1 to 33 will commence on 15 September 2007, 12 months after the day that the Amendment Act received the Royal Assent.

Subsections 4(1) and 4A(2) of the *Acts Interpretation Act 1901*, read together, provide that regulations may be made between the passing and commencement of an Act, as long as such regulations do not commence before the Act upon which they rely for their authority.

Sections 44A, 44B and 44C which will be inserted into the Act by the Amendment Act provide that matters that may be dealt with by regulations include:

- restricting the transport of cargo by air to cargo which has received clearance;
- requirements for the examination, certification and clearance of cargo;
- the examination, certification and clearance of cargo by all regulated air cargo agents or all aircraft operators, or by specified classes of regulated air cargo agents or aircraft operators, or one or more specified regulated air cargo agents or aircraft operators;
- the issue by the Secretary of the Department of Transport and Regional Services (the Secretary) of notices regarding the types of cargo to be examined and the methods, techniques and equipment to be used; and
- requirements in relation to regulated air cargo agents.

The Regulations amend the Principal Regulations which prescribe the necessary requirements for the security of air cargo to:

- prescribe requirements for RACAs;
- prescribe the class of aircraft operators required to certify cargo;
- permit the Secretary to issue notices regarding types of cargo to be examined and the methods, techniques and equipment to be used;

- restrict the transport of cargo by air to cargo which has received clearance; and
- detail requirements for the examination, clearance and certification of cargo.

The Principal Regulations currently prescribe the classes of aircraft operator who must have a Transport Security Program (TSP), and what the TSP must contain relevant to the security of cargo. The amendments expand the class of aircraft operators who are required to specify within their TSP security measures that are to be applied to cargo, and methods, techniques and equipment that are to be used to examine cargo.

The amendments simplify the amount of information in a RACA application, and require the RACAs to set out methods, techniques and equipment to be used to examine cargo in their TSP. The amendments also require a RACA applicant to identify if they are performing the functions of a cargo terminal operator or cargo consolidator, operations identified as requiring higher levels of security than others. The amendments provide that a person who was a RACA immediately before the commencement of the new regulations is taken to continue to be a RACA for the new regulations.

The amendments require that the operators of a prescribed aircraft only carry cargo that has been security cleared, and that the operator certifies that such cargo has been cleared. Certification occurs through the act of loading cargo on a prescribed aircraft, creating a clear link between the security treatment of cargo and its subsequent carriage. A prescribed aircraft is defined in section 9 of the Act.

The Secretary is also given power to issue notices regarding cargo examination and enable appropriate examination requirements to be prescribed and applied quickly to specific material and locations to best respond to specific security risks.

Consultation and Regulatory Impact are explained at Attachment A.

Attachment B explains each clause of the Amendment Regulations.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 15 September 2007, immediately after the commencement of Schedule 2 to the Amendment Act.

ATTACHMENT A

CONSULTATION

Consultation on the Amendment Regulations has been undertaken with the Cargo Working Group of the Aviation Security Advisory Forum (ASAF). The Cargo Working group is comprised of representatives of the airfreight industry. The ASAF consists of representatives of the broader aviation industry.

Further consultation was undertaken with aircraft operators and members of the Cargo Working Group on an individual basis.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) has advised that no regulation impact statement is required for these Regulations because they are of a minor or machinery nature.

ATTACHMENT B

Details of the *Aviation Transport Security Amendment Regulations 2007 (No. 3)*

Regulation 1 – Name of Regulations

The title of the Regulations is the *Aviation Transport Security Amendment Regulations 2007 (No. 3)*

Regulation 2 – Commencement

The Regulations commence immediately after the commencement of items 1 to 33 of Schedule 2 to the *Aviation Transport Security Amendment Act 2006*. However, item 6 of Schedule 1 commences immediately after item 5 of Schedule 1.

Regulation 3 – Amendment of *Aviation Transport Security Regulations 2005*

The Principal Regulations are amended as set out in Schedule 1.

Regulation 4 – Transitional

Regulation 4 provides that a person who was a Regulated Air Cargo Agent (RACA) under regulation 4.43 immediately before the commencement of this regulation is taken to continue to be a RACA for regulation 4.43.

Schedule 1 – Amendments

Item 1 – Regulation 2.41 What aircraft operator's TSP must contain – security of cargo etc

New subregulation 2.41(1) provides that the operator of a prescribed air service must set out the methods, techniques and equipment to be used for the examination of cargo in their Transport Security Program (TSP) if they examine the cargo or have another person who is not a RACA examine the cargo. This item expands the range of aircraft operators required to detail examination procedures for air cargo in their TSP from operators of *screened air services* to all operators of a *prescribed air service*.

[For definition of *prescribed air service* see regulation 1.06; for *screened air service* see regulation 4.02]

The TSP must also specify:

- procedures for receipt and handling of cargo (subregulation 2.41(2));
- measures and procedures used to ensure that cargo is secure at all times, including the supervision and control of access to cargo that has been security cleared (subregulation 2.41(3));
- measures and procedures used to ensure the security of diplomatic mail (subregulation 2.41(4)); and
- procedures to be used for suspect cargo (subregulation 2.41(5)).

Item 2 – Regulation 2.48 Scope of RACA’s TSP

New subregulation 2.48(1) requires that a RACA must set out in its TSP the measures and procedures that it will use to securely examine, handle store and transport cargo, and make arrangements for the secure movement of cargo. This item requires that the measures and procedures be carried out in a secure manner.

New subregulation 2.48(2) sets out that the measures and procedures must be applied to cargo that is in the RACAs possession or under his control at each site or facility covered by the TSP.

These subregulations clarify the scope of the TSP.

Item 3 – New subregulation 2.51(1A)

New subregulation 2.51(1A) requires a RACA to specify in its TSP the methods, techniques and equipment to be used for the examination of cargo. This item supplements the existing cargo security measures that subregulation 2.51(1) requires the RACA’s TSP to contain.

Item 4 – New paragraph 2.54(2)(ba)

New paragraph 2.54(2)(ba) requires a RACA to indicate in its TSP whether it is operating as a cargo terminal operator or cargo consolidator at a site or facility covered by the TSP. This requirement is additional to the operational details that a RACA must include in its TSP. RACAs with these types of operations may need to apply increased levels of cargo examination in response to security threats.

Item 5 – Subdivisions 4.1.3 and 4.1.4

Item 5 omits existing subdivisions 4.1.3 and 4.1.4. Relevant provisions of 4.1.3 are now in the new Division 4.1A and subdivisions 4.1A.1 and 4.1A.2. Subdivision 4.1.4 contained transitional provisions which ceased to have effect on 9 March 2007.

Item 6 – New Division 4.1A Examining, certifying and clearing cargo

New Division 4.1A sets out the requirements for examining, certifying and clearing cargo, and the requirements for designating RACAs.

New Subdivision 4.1A.1 Requirements for examining, certifying and clearing cargo

New Subdivision 4.1A.1 sets out the requirements for examining, certifying and clearing cargo.

New regulation 4.40 Examining cargo

Subregulation 4.40(1) requires a person who is examining cargo to examine the cargo for unauthorised explosives.

Subregulation 4.40(2) provides that subregulation (1) does not apply to cargo where the Secretary of the Department of Transport and Regional Services (the Secretary) has issued a notice providing that cargo may be certified without being examined.

Subregulation 4.40(3) provides that a RACA or aircraft operator must examine air cargo in accordance with its TSP and in accordance with any written notice that the

Secretary may have issued under subregulation 4.40 (4). Where a notice has been issued by the Secretary this item requires that the examination must be in accordance with both the TSP and the written notice.

Subregulation 4.40(5) provides that a notice issued by the Secretary under subregulation 4.40(4) may state the types of cargo to be examined, the methods techniques and equipment to be used for examining the cargo and the procedures for handling the cargo after it has been examined.

Subregulation 4.40(6) requires an aircraft operator or RACA to whom a notice is issued under subregulation 4.40(4) to comply with the notice. The penalty for non-compliance is 100 penalty units.

Subregulation 4.40(7) provides that a contravention of subregulation 4.40(6) is a strict liability offence.

New regulation 4.41 Certifying and clearing cargo

Subregulation 4.41(1) establishes that an aircraft operator may certify cargo by loading it on an aircraft. New subregulation 4.41(2) prescribes that only cargo that has been cleared can be carried on a prescribed aircraft. Subsection 44B(2) of the Amendment Act provides that cargo receives clearance if, after being examined, it is certified, unless the regulations or the Secretary by written notice provide that the cargo may be certified without being examined. Cargo must therefore be examined, or be provided for in a notice issued under subsection 44B(2) of the Amendment Act, to be loaded (certified) for carriage aboard an aircraft. New subregulation 4.41(1) provides the operator with a mechanism to certify the cargo without the need to introduce new documentation.

Subregulation 4.41(2) prescribes that only cargo that has been cleared can be carried on a prescribed aircraft, and provides for a penalty of 100 penalty units.

Subregulation 4.41(3) provides that an offence against subregulation 4.41(2) is an offence of strict liability.

Subregulation 4.41(4) requires that an aircraft operator must supervise and control access to cargo that has received clearance as specified in its TSP.

New Subdivision 4.1A.2 Designating regulated air cargo agents

New Subdivision 4.1A.2 sets out the requirements for designating RACAs.

New regulation 4.42 Regulated air cargo agents

This amendment maintains the requirement that a person must be carrying on a business related to the transport of air cargo in order to be a RACA. The item has removed the requirement that a person's name must also appear on the Secretary's list (of RACAs) for the person to be a RACA, and substituted the requirement that the person must also be designated as a RACA under regulation 4.43.

New regulation 4.43 How to become a RACA

Subregulation 4.43(1) clarifies that to apply to be designated as a RACA a person must be carrying on a business mentioned in paragraph 4.42(a). This item corrects an anomaly within the previous regulation whereby a person need not have been involved in the transport of air cargo to apply to be designated as a RACA, yet the application could not be approved by the Secretary unless the Secretary was reasonably satisfied the applicant was so involved.

Subregulation 4.43(2) maintains the existing list of information that must be provided with an application for designation as a regulated air cargo agent, with the exception that the requirement to provide an Australian Business Number (ABN), the provision of which is not critical to the approval process, has been removed.

Subregulation 4.43(3) continues the obligation for a designated RACA to undertake to notify the Secretary in writing within seven working days of becoming aware of a significant change to the circumstances that existed at the time of application to be a designated RACA.

Subregulation 4.43(4) provides that the Secretary may approve an application for designation as a RACA if the Secretary is satisfied that the application contains the information required by subregulation 4.43(2), that the application contains the undertaking mentioned in subregulation 4.43(3), and that the applicant's business includes handling or making arrangements for handling cargo.

Subregulation 4.43(5) requires that the Secretary must notify the applicant in writing within 14 days of making a decision on the application.

Subregulation 4.43(6) requires that if the decision on an application is refusal, reasons for the decision must be given in the notice required under subregulation 4.43(5).

New regulation 4.44 Revocation of RACA designation

Subregulation 4.44(1) outlines the circumstances under which the Secretary may revoke the designation of a person as a RACA. The circumstances are:

- information given in the RACA's application is false; or
- the RACA's business no longer includes handling or making arrangements for the transport of cargo; or
- the RACA has not advised the Secretary of a significant change to the RACA's circumstances since the RACA's application; or
- the RACA has failed to comply with a special security direction under section 73 of the Act; or
- the RACA does not have a Transport Security Program approved by the Secretary; or
- the RACA has asked the Secretary in writing to have the designation as a RACA revoked; or
- the Secretary is reasonably satisfied that the RACA's designation as a RACA poses a threat to aviation security.

Subregulation 4.44(2) requires that the Secretary must notify a RACA in writing within 14 days, setting out the decision and reasons for it, where he revokes the designation of the person as a RACA.

New regulation 4.45 Secretary's list of regulated air cargo agents

Subregulation 4.45(1) provides that the Secretary must keep a list of persons designated as RACAs.

Subregulation 4.45(2) provides that the Secretary may publish the list.

New regulation 4.46 Disclosure of information

This item sets out the measures applying to the safeguarding of information pertaining to the transport of air cargo.

Subregulation 4.46(1) provides that an aviation industry participant must not disclose to a person security measures and procedures to be applied to cargo. The penalty for non-compliance is 50 penalty units.

Subregulation 4.46(2) provides that, in spite of subregulation (1), an aviation industry participant may disclose security measures and procedures that will or will not be applied to particular cargo where the disclosure is in accordance with the aviation industry participant's TSP.

Subregulation 4.46(3) provides that an aviation industry participant must not disclose details about the airline or flight on which particular cargo will be carried other than where the disclosure is in accordance with the aviation industry participant's TSP. The penalty for non-compliance is 50 penalty units.

Subregulation 4.46(4) requires that an aviation industry participant must make a record of persons who are given airline or flight information under subregulation (3). The penalty for non-compliance is 20 penalty units.

Subregulation 4.46(5) provides that an aviation industry participant must keep the record for three years. The penalty for non-compliance is 20 penalty units.